

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,
Plaintiff,

v.

OMAR LIZARRAGA-CEDANO,
Defendant.

No. CR-04-015-FVS

ORDER DENYING MOTION TO
VACATE

THIS MATTER comes before the Court without oral argument based upon Omar Lizarraga-Cedano's motion to vacate. He is representing himself. The government is represented by Assistant United States Attorney Stephanie Whitaker.

BACKGROUND

During 2003, law enforcement officers arrested a number of persons who were distributing methamphetamine. Some of them began cooperating. More than one indicated that Omar Lizarraga-Cedano was involved. The officers obtained search warrants for a residence at which he had stayed in the past (1635 E. Bismark) and a residence at which he was staying at the time (809 N. Vista). At the East Bismark residence, officers found two handguns and a number of items of drug paraphernalia, including a baggie with his fingerprint on it. Several items of drug paraphernalia contained traces of either cocaine or a substance used to "cut" cocaine. At the North Vista residence, officers found bills that had been sent to Antonio Medina, a name used

1 by Mr. Lizarraga-Cedano. One of the bills had been mailed to the East
2 Bismark residence. In addition, the officers found two handgun
3 ammunition "clips." One of them fit a handgun at the East Bismark
4 residence. The investigation continued. In due course, the officers
5 arrested Mr. Lizarraga-Cedano and a grand jury returned an indictment.
6 He exercised his right to a jury trial. Besides the items that were
7 seized at the East Bismark and North Vista residences (together with
8 other physical evidence), the government presented testimony from
9 multiple witnesses who implicated him in the distribution of both
10 methamphetamine and cocaine. For example, Michelle Mitchell said
11 that, at the time of her arrest, she and her boyfriend were receiving
12 large quantities of methamphetamine from Mr. Lizarraga-Cedano every
13 two or three days. Breanne Ruff corroborated her testimony. The jury
14 convicted Mr. Lizarraga-Cedano of conspiracy to distribute
15 methamphetamine, 21 U.S.C. § 846, and possession with intent to
16 distribute cocaine, 21 U.S.C. § 841(a)(1). His attorney filed a
17 motion for a new trial. Fed.R.Crim.P. 33. The Court denied the
18 motion at the beginning of the first of two sentencing hearings. At
19 the conclusion of the second hearing, the Court sentenced Mr.
20 Lizarraga-Cedano to 372 months imprisonment on the conspiracy count
21 and 240 months imprisonment on the possession-with-intent-to-
22 distribute count. The two terms are running concurrently. Mr.
23 Lizarraga-Cedano appealed. Among other things, his attorney argued
24 that the evidence was insufficient to support the possession-with-
25 intent-to-distribute conviction. The Ninth Circuit disagreed,
26 affirming the conviction. The District Court Executive received the
mandate on August 21, 2006. On September 20, 2006, Mr. Lizarraga-
Cedano filed a motion to vacate both convictions and both sentences.

1 28 U.S.C. § 2255. He alleges that his former attorney failed to
2 provide effective assistance at sentencing and on appeal.

3 **RULING**

4 Mr. Lizarraga-Cedano is not challenging the representation that
5 his former attorney provided prior to or during his trial. Instead,
6 it is the representation that counsel provided at sentencing and on
7 appeal which he challenges. More specifically, he alleges that his
8 former attorney should have argued that his mere presence at the East
9 Bismark and North Vista residences did not establish that he possessed
10 the items which the officers seized at those places. Had counsel made
11 this argument, says Mr. Lizarraga-Cedano, neither this Court nor the
12 Ninth Circuit would have concluded that his convictions were supported
13 by sufficient evidence. Moreover, he submits that, even assuming the
14 Ninth Circuit had affirmed his convictions, the circuit court would
15 not have upheld a sentencing enhancement based upon possession of a
dangerous weapon.

16 A. Assistance of Counsel at Sentencing

17 Since deciding *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct.
18 2052, 80 L.Ed.2d 674 (1984), the Supreme Court has not determined
19 "what standard should apply to ineffective assistance of counsel
20 claims in the noncapital sentencing context." *Cooper-Smith v.*
21 *Palmateer*, 397 F.3d 1236, 1244 (9th Cir.), cert. denied, --- U.S.
22 ---, 126 S.Ct. 442, 163 L.Ed.2d 336 (2005). See also *Davis v.*
23 *Grigas*, 443 F.3d 1155, 1158 (9th Cir.2006) (same). Even so, it is
24 likely that an ineffective-assistance claim arising out of a
25 noncapital sentencing in federal court is governed by the *Strickland*
26 standard. Cf. *Davis*, 443 F.3d at 1159 (Graber, J., concurring)
(petition for habeas relief under 28 U.S.C. § 2254) (quoting *Glover v.*

1 *United States*, 531 U.S. 198, 202-04, 121 S.Ct. 696, 148 L.Ed.2d 604
2 (2001)). The *Strickland* standard is a familiar one. To begin with,
3 Mr. Lizarraga-Cedano must demonstrate that his former attorney's
4 performance was deficient. Furthermore, he must demonstrate that he
5 suffered some material prejudice as a result. 466 U.S. at 687, 104
6 S.Ct. at 2064.

7 Mr. Lizarraga-Cedano is correct about at least one thing.
8 Whether he possessed the firearms that the officers seized at the East
9 Bismark residence was a significant issue at sentencing. The
10 probation officer recommended a two-level enhancement on the ground
11 that Mr. Lizarraga-Cedano possessed the firearms that were seized at
12 that location. U.S.S.C. § 2D1.1(b). On November 30, 2004, his former
13 attorney filed a written response to the presentence investigation
14 report. In paragraph four, he objected to the enhancement recommended
15 by the probation officer. He reiterated the objection at the first of
the two sentencing hearings:

16 I would also ask the Court to reflect upon the evidence,
17 there were firearms not only found in the house on East
18 Bismark *which my client had on occasion used, used the*
19 *house*, but there were firearms also found at the Michelle
Mitchell, Keith Peer residence in Coeur d'Alene.

20 (Transcript of Proceedings, December 15, 2004, at 14.) (Emphasis
21 added.) No doubt counsel could have argued his position more clearly.
22 However, his oral argument must be evaluated in light of the written
23 objection he had submitted previously. Considered together, they
24 adequately informed the Court that, while Mr. Lizarraga-Cedano
25 acknowledged being present at the East Bismark residence, he denied
26 possessing the firearms seized by the officers. Thus, the record
contradicts Mr. Lizarraga-Cedano's allegation that his former attorney

1 failed, at sentencing, to dispute the two-level sentencing enhancement
2 recommended by the probation officer. Counsel's performance in that
3 regard was reasonable. See *Strickland*, 466 U.S. at 690, 104 S.Ct.
4 2066 (a wide range of representation satisfies the Sixth Amendment).

5 B. Assistance of Counsel on Appeal

6 A person convicted of a federal crime has a right to effective
7 representation during the course of his direct appeal. *United States*
8 *v. Cross*, 308 F.3d 308, 315 (3d Cir.2002). This right is not grounded
9 in the Sixth Amendment, but in the Due Process Clause of the Fifth
10 Amendment. *United States v. Baker*, 256 F.3d 855, 859 n.2 (9th
11 Cir.2001); *Miller v. Keeney*, 882 F.2d 1428, 1434 n.4 (9th Cir.1989).
12 Despite the fact that an allegation of ineffective appellate
13 assistance rests upon the Fifth Amendment, rather than the Sixth
14 Amendment, it is also governed by the *Strickland* standard. *Smith v.*
15 *Robbins*, 528 U.S. 259, 285, 120 S.Ct. 746, 764, 145 L.Ed.2d 756
(2000); *Baker*, 256 F.3d at 862.

16 *1. Conspiracy to distribute methamphetamine*

17 The opening brief that Mr. Lizarraga-Cedano's former attorney
18 submitted to the Ninth Circuit listed four issues. The third issue
19 involved the sufficiency of the evidence. Counsel's statement of the
20 issue mentioned both the conspiracy conviction and the possession-
21 with-intent-to-distribute conviction; but in analyzing the issue,
22 counsel focused exclusively upon the latter conviction. He did not
23 discuss the conspiracy conviction at all. However, the omission did
24 not prejudice Mr. Lizarraga-Cedano. The evidence of a conspiracy to
25 distribute methamphetamine was overwhelming. The testimony of Ms.
26 Mitchell and Ms. Ruff was enough to prove beyond a reasonable doubt
that Mr. Lizarraga-Cedano knowingly participated in it. See *United*

1 *States v. Alvarez*, 358 F.3d 1194, 1201-02 (9th Cir.), cert. denied sub
2 nom., *Valenzuela v. United States*, 543 U.S. 887, 125 S.Ct. 126, 160
3 L.Ed.2d 148 (2004). Thus, even if counsel had challenged the
4 sufficiency of the evidence supporting the conspiracy conviction, and
5 even if he had persuaded the Ninth Circuit that a rational jury could
6 not have found that Mr. Lizarraga-Cedano possessed the East Bismark
7 evidence, the circuit court nevertheless would have affirmed the
8 conviction. It follows that Mr. Lizarraga-Cedano suffered no
9 prejudice as a result of counsel's failure, on appeal, to challenge
10 the sufficiency of the evidence supporting the conspiracy conviction.
11 *Cf. Baker*, 256 F.3d at 863 (appellate counsel's failure to challenge
12 the sufficiency of the evidence was not prejudicial because, given the
13 record as a whole, the challenge would not have had a reasonable
14 probability of success on appeal).¹

15 *2. Possession with intent to distribute cocaine*

16 On appeal, Mr. Lizarraga-Cedano's former attorney challenged the
17 sufficiency of the evidence supporting his conviction for possession
18 with intent to distribute cocaine. Mr. Lizarraga-Cedano claims his
19 brief was inadequate. As noted above, Mr. Lizarraga-Cedano insists
20 counsel should have pointed out that his mere presence at the East
21 Bismark residence did not prove he possessed the items that were
22 located there. The problem with Mr. Lizarraga-Cedano's contention is

23 A person may not obtain relief under § 2255 based upon a
24 claim of ineffective appellate assistance unless he demonstrates
25 both deficient performance and prejudice. *Cross*, 308 F.3d at
26 315. Failure to establish either element is fatal to his claim.
Id. Since a reviewing court may resolve the prejudice prong of
the test without passing judgment upon counsel's performance, it
is often desirable to begin with the prejudice prong. *Id.*

1 there is no reason to think this omission affected the outcome of the
2 Ninth Circuit's review of his conviction for possession with intent to
3 distribute cocaine. Without question, the items seized at the East
4 Bismark residence were an important part of the government's case.
5 The jury heard conflicting evidence regarding Mr. Lizarraga-Cedano's
6 presence at that location. However, the Court instructed the jury
7 that mere presence was not enough to establish that he committed the
8 crimes charged unless the jury found that he was a participant.²
9 While counsel did not mention the instruction by number during his
10 closing argument (it was No. 25), he did say that Mr. Lizarraga-
11 Cedano's presence at the East Bismark residence was not enough to
12 establish that he sold cocaine. (Verbatim Report of Proceedings for
13 September 10, 2004, at 89.) Nevertheless, the jury returned a verdict
14 of guilty. The Ninth Circuit reviewed the evidence upon which the
15 verdict was based. In doing so, the circuit court was obligated to
16 "respect the exclusive province of the jury to determine credibility
17 of witnesses, resolve evidentiary conflicts, and draw reasonable
18 inferences from the proven facts, by assuming the jury resolved all
19 such matters in a manner which supports the verdict." *United States*
20 *v. Gillock*, 886 F.2d 220, 222 (9th Cir.1989) (internal punctuation and
21 citation omitted). Thus, even if counsel had cited the mere presence
22 doctrine in his brief, the Ninth Circuit almost certainly would have
23 upheld his possession-with-intent-to-distribute conviction given the
24 evidence that was presented to the jury and the instructions that it
25 received. It follows that Mr. Lizarraga-Cedano suffered no prejudice
26 as a result of his former attorney's failure to discuss the mere

The instructions are court record number 118.

1 presence doctrine.

2 **IT IS HEREBY ORDERED:**

3 Mr. Lizarraga-Cedano's motion to vacate (Ct. Rec. 217) is denied.

4 **IT IS SO ORDERED.** The District Court Executive is hereby
5 directed to enter this order and furnish copies to Mr. Lizarraga-
6 Cedano and to counsel for the government.

7 **DATED** this 9th day of August, 2007.

8 s/ Fred Van Sickle
9 Fred Van Sickle
United States District Judge